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PLEASE REPLY TO WASHINGTON, D.C. OFFICE

January 15, 2002

VIA E-MAIL TRANSMISSION

Ambassador Robert B. Zoellick
Attn: Andrew Stephens
Director, Steel Trade Policy
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: Supplementary Public Comments on Potential Action Under Section 203 of the Trade Act of 1974 with Regard to Imports of Certain Steel

Dear Ambassador Zoellick:

These comments are submitted on behalf of U.S. Steel Košice, s.r.o., a Slovakian producer of carbon and alloy flat products, in response to the request from the Trade Policy Staff Committee at our meeting with the Committee on January 9th. At that time the TPSC requested that we comment further on whether it was permissible to award a quota to a country which had zero, or near zero, exports during the representative period.¹ This response supplements our prior letter to you dated January 4, 2002.²

As discussed below, we believe that the question posed must be considered in the context of the fact that exports to the United States during the representative period were distorted by the unfair trading practices of certain other foreign producers. The WTO rules permit the United States to allocate a quota among countries in a way that does not exactly reflect the countries' proportional share of exports, in order to adjust for "special factors." Under the current circumstances, this requires the President to take into account the distorting effect of past unfair

¹ Slovakia has between zero and 1% of overall U.S. imports in the case of plate, corrosion resistant and other coated sheet and strip, tin mill products, and slab.

² Nothing in this letter, or the letter of January 4, is intended to argue whether a quota, or some other form of relief, should be awarded the U.S. steel industry. This material is intended merely to address the right of Slovakia to a quota if the President adopts that form of remedy.

trade practices by some foreign producers. When that factor is taken into account, Slovakia is entitled to a quota because in the absence of the unfair trading practices it could have reasonably expected to export the subject merchandise to the United States during the representative period.

In those instances in which Slovakia's record of exports is near zero, the country should also receive a quota. Nothing in the WTO rules permit a Member to deny a quota to a foreign producer because the size of the quota is small. Furthermore, the quota should be increased to compensate for the distorting effect of the unfair trading practices of exporters in other countries.

Under such circumstances, both WTO rules and U.S. law anticipate that the quotas should be allocated on a basis that treats countries differently depending on whether their past export levels reflect artificial conditions.

Slovakia's Right to Quota Even If Record Shows No Exports

Even in those cases in which Slovakia may have not exported any subject merchandise to the United States, it is entitled to a quota since USSK has hereby specifically requested award of a quota and indicated substantial interest in exporting the subject merchandise to the U.S. In responding to this request, the United States must take into account the relative competitiveness of Slovakia that was undermined during the representative period by the unfair trade practices of other foreign producers.

Article 5.2(a) requires that in allocating quotas, due account shall be taken "of any special factors which may have affected or may be affecting the trade in the product." The same direction to a Member to consider "special factors" in setting a quota appears, of course, in Article XIII.2(d) and Article XIII.4 of GATT 1994. A note to Article XIII references Article XI of GATT 1994, which contains a similar reference to "special factors." According to the note to Article XI, the term "special factors" includes instances when there have been "changes in relative productive efficiency...between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement."

The thrust of the GATT note discussing the term "special factors" is that quotas should be adjusted to reflect the relative productive efficiency, or competitiveness, of the different foreign producers. It emphasizes that quotas should not be awarded on the basis of "changes artificially brought about by means not permitted under the Agreement." The record of the deliberations of the Sub-Committee at the Havana Conference which considered what became the notes to Article XI and XIII indicate that the Sub-Committee agreed that "it was desirable to make clear that, in cases where separate import quotas were allotted to the various foreign suppliers, a country whose productive efficiency or ability to export had increased relatively to other foreign suppliers since the representative period on which import quotas were based should receive a relatively larger import quota."³ In other words, quotas should not be based on the

³ Havana Reports, p. 95, para. 52, as cited in "Guide to GATT Law and Practice," Vol. 1, p. 403 (Geneva, 1995).

results of a previous period, in which one foreign producer's share of U.S. imports was "artificially" affected by unfair trade practices, when those artificial factors have been subsequently removed by government action consistent with Article VI of GATT 1994.

That is precisely the situation presented in this proceeding. As discussed in our initial letter dated January 4th, the effect of the relatively recent orders or agreements restricting 23 exporters of carbon and alloy flat products constitutes a special factor that the President must take into account in allocating any quotas. The effect of these orders will be to eliminate artificial advantages of certain foreign producers, and allow United States imports to more accurately reflect the relative competitiveness, or in the words of the GATT note, the "relative productive efficiency," of the exporters. The record of exports during the representative period do not do this because of the distorting effect of the past unfair trading practices before they were addressed by U.S. action. The WTO rules allow the President to adjust Slovakia's quota to reflect these facts. Failure to take these special factors into account would, in fact, result in the very artificial changes in the relative competitiveness of foreign producers that the note to Article XI warns against. Thus, awarding an equitable quota to Slovakia requires the President to take into account as a special factor the effect of the past unfair trading practices of other foreign producers.

In addition to the specific provision for "special factors," it is evident that Article 5.2(a) of the Safeguards Agreement requires any quota to be based on a representative period. If sales during a period have been distorted by the unfair trading practices of some countries, simple reliance on the import numbers from that unrepresentative period would not comply with the requirements of the WTO.

Slovakia's Right to Quota Even if Records Show Near Zero Exports

Nothing in either U.S. law or the WTO rules permit the President to deny Slovakia a quota for products that show a near zero record of exports during the representative period. The language in Article 5.2 of the Safeguards Agreement does not exempt from the general requirement for proportional allocation of quotas a Member that may have a quota that is considered near zero. The language does not contain an exemption for the administrative convenience of the custom services of the country administering the quota. As we discussed at our January 9th meeting, administrative convenience may require that the President combine Slovakia's quota with that of other market economy members of the Central European Free Trade Agreement in the case of Slovakia's smaller exports of certain carbon and alloy products to the United States. While we urge you not to recommend this course of action, it would at least comply with the requirements of Article 5.2 to give every country with prior exports an opportunity to continue to export to the United States. To deny Slovakia any access whatsoever to a quota because it is considered near zero would be inconsistent with the requirements of Article 5.2.

In any event, as discussed above, Slovakia's near zero quota should be increased to reflect the distorting effect that past unfair trade practices of other countries have had on

Slovakia's export figures during the representative period selected. Taking these special factors into account has the effect of increasing a quota that is otherwise near zero.

WTO Permits Different Treatment of Exporters Because of Special Factors

So long as a country adjusts country-specific quotas to take into account "special factors," Article 5.2 of the Safeguard Agreement and Article XIII.2(d) of GATT make it clear that a Member does not have to treat foreign producers in strict accord to the relative export levels of countries during the representative period. The authorization in Article XIII.2(d) to take special factors into account appears as a further clarification of the general requirements in Article XIII.1 that any quantitative restriction shall be applied similarly to like products from all third countries. In other words, the non-discriminatory requirements of Article XIII.1, and the more general MFN requirements of Article I of GATT 1994, can not be interpreted as preventing a Member from affording different countries different treatment because of special factors.

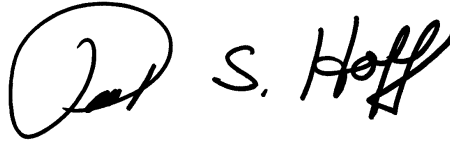
Any other interpretation would be inconsistent with the language in Article XIII.2(d) and Article XIII.4, and negate the effect of the "special factors" language in Article XIII. Taking "special factors" into account inevitably will mean a departure from strict proportional quotas, to the advantage of some foreign producers and the disadvantage of others. If Article XIII.1 is read as prohibiting such different treatment, then the language in Article XIII.2(d) and Article XIII.4 is surplusage. There is no evidence that the drafters of the Article intended these provisions to be surplusage, especially when a far more reasonable interpretation of the Article allows for the full effect of both Article XIII.1 on the one hand, and Articles XIII.2(d) and Article XIII.4 on the other. The language in Article 5.2 tracks of course the language in Article XIII.2 of GATT 1994, and therefore similarly modifies the general expectations of equal treatment for all quota holders contained in GATT 1994.

U.S. Law Allows the President to Treat Foreign Producers Differently

As long as the WTO rules allow the United States to take special factors into account in allocating quotas, U.S. trade laws do not bar the President from doing so. Under U.S. law the President may act under the 201 laws "without regard to the provisions of §2136(a)..." that require equal application of import restrictions to all foreign countries. See 19 U.S.C. 2254(e)(1). The provision specifies that the President may act without regard to Section 2136(a) "only after consideration of the relation of such actions to the international obligations of the United States." As discussed above, the WTO rules fully anticipate, and in fact require, taking special factors into account that may result in treating different foreign producers differently.

In summary, the WTO rules require the President to take in account as a special factor the distorting effect of the unfair trade practices of other countries. When that is done, Slovakia is entitled to a quota even in those product areas in which it did not export during the representative period. In those other cases in which the record of Slovakia's exports is near zero, WTO rules require that it receive a quota, and the size of the quota should be adjusted upward to take into account the same special factors.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul S. Hoff". The signature is written in a cursive style with a large, looping initial "P" and "H".

William E. Perry
Paul S. Hoff
John Kalitka